DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 97-142
Rules and Policies on Foreign Participation	)	
in the U.S. Telecommunications Market	)	

RECEIVED

JUL - 9 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF

GTE SERVICE CORPORATION

GTE Service Corporation and its affiliated domestic telephone operating companies, wireless companies, long distance company and foreign telephone operating companies

Ward W. Wueste
GTE Service Corporation
One Stamford Forum
Stamford, CT 06904
(203)965-2000

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202)463-5200

R. Michael Senkowski
John B. Reynolds, III
Todd D. Daubert

of

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

ITS ATTORNEYS

Dated: July 9, 1997

No. of Copies rec'd 0+9

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 97-142
Rules and Policies on Foreign Participation	)	
in the U.S. Telecommunications Market	)	

COMMENTS OF
GTE SERVICE CORPORATION

I. INTRODUCTION AND SUMMARY

GTE Service Corporation and its affiliated domestic telephone operating companies,[1] wireless companies,[2] long distance company[3] and foreign telephone operating companies,[4] (collectively "GTE"), file these comments in response to the Federal Communications Commission ("FCC" or "Commission") Notice of Proposed Rulemaking on Foreign Participation in the U.S. Telecommunications Market.[5] GTE commends the Executive branch

1 GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.

2 GTE Mobilnet Incorporated, Contel Cellular Inc. and GTE Airfone Incorporated.

3 GTE Card Services Incorporated.

4 Compañia Dominicana de Telefonos ("CODETEL"), the local exchange carrier in the Dominican Republic and Compañia Anonima Nacional Telefonos de Venezuela ("CANTV"), the local exchange carrier in Venezuela.

5 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket No. 97-142, FCC 97-195 (rel. June 4, 1997), Order and Notice of Proposed Rulemaking [hereinafter "*NPRM*"].

and the Commission for their role in negotiating the World Trade Organization ("WTO") global basic telecommunications agreement,[6] which promises to liberalize international telecommunications markets.

GTE believes this liberalization will serve its diverse national and international business interests very well. GTE is involved in U.S. and foreign-based local exchange, wireless, air-to-ground and domestic and international long distance services, as well as other telecommunications-related businesses. It is from this balanced perspective that GTE offers its views on the *NPRM* implementing the U.S. commitments under the GBT agreement. GTE fully endorses the competitive marketplace envisioned by this agreement and its comments are designed to promote making that vision a reality.

GTE particularly notes the importance of the widespread adoption of the binding, enforceable regulatory structures and disciplines set forth in the Reference Paper on Pro-Competitive Regulatory Principles[7] in guaranteeing that foreign markets will be effectively, as well as formally, open to U.S. investors and service providers. Reference Paper signatories undertake to provide open, nondiscriminatory and cost-oriented interconnection between competing carriers, to prohibit anticompetitive conduct and to establish independent regulatory agencies to oversee national telecommunications markets. Implemented and enforced conscientiously, the Reference Paper will open foreign markets and vastly reduce the risk that foreign telecommunications service providers can take advantage of circumstances in their home

---

6 *World Trade Organization Group on Basic Telecommunications,* Fourth Protocol to the General Agreement on Trade in Services (February 15, 1997) [hereinafter "GBT" Agreement].

7 *Reference Paper on Pro-Competitive Regulatory Principles,* GBT Agreement (February 15, 1997) [hereinafter "Reference Paper"].

countries to distort competition in the U.S. market. Accordingly, GTE submits that the Commission should rely upon the binding commitments in the Reference Paper to deter anticompetitive practices in the United States.

Although the goals and focus of the Reference Paper are largely consistent with the U.S. domestic regulatory structure envisioned in the 1996 Telecommunications Act,[8] the Reference Paper does not enact the Telecommunications Act on an international basis. Like other multilateral trade agreements, the GBT Agreement represents a series of parallel commitments to liberalize telecommunications markets in specific ways. It does not represent an undertaking to harmonize the regulatory standards or legal regimes applicable in the GBT member countries, except to the extent of the principles in the Reference Paper, and even then, countries will vary in their approach to implementing those principles.

GTE fully supports the Commission's goal of ensuring that further opening the U.S. market does not result in anticompetitive practices by foreign carriers or their U.S. affiliates. In pursuing this goal, however, the Commission should not lose sight of the other fundamental U.S. interest in the GBT: the opportunity to obtain meaningful and enforceable market openings abroad.[9] Too zealously protecting the U.S. market risks countermeasures by foreign countries. As a critical actor in the U.S. process (and, hence, in the international process), the Commission should seek to strike the optimal balance between U.S. market protection and opening foreign markets. In many cases, there will be no conflict between these two goals. In some instances,

---

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[9] *See* General Agreement of Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994) [hereinafter "GATS"].

however, broader U.S. interests, including the public interests the Commission is charged with protecting, may be best served by regulatory restraint at the national level.

Specifically, GTE recommends that the Commission should eliminate or vastly reduce the regulatory burdens associated with designation as a "dominant" or "supplemental dominant" carrier. The *NPRM* establishes no basis for subjecting the U.S. affiliates of carriers from WTO member countries to dominant regulation or to additional burdens such as prior approval for the addition of circuits or a prohibition on joint marketing agreements with affiliates. Existing regulation, including the Commission's *Flexibility Order*,[10] or other, less burdensome, means are adequate to protect the U.S. market from any potential competitive harm these practices may threaten.

Moreover, GTE is concerned that some of the bases on which the Commission is willing to consider denying access to the U.S. market are inconsistent with U.S. obligations under the GBT Agreement and the GATS. In particular, measures focusing on the characteristics of the home market of a GBT signatory, even if the signatory is in compliance with its GBT commitments, and the range of "other public interest factors" the Commission will evaluate seem quite likely to be challenged by other WTO Members. GTE submits that such challenges can and should be avoided.

If aspects of the *NPRM* were to be challenged in the WTO and the dispute were resolved against the United States, the Commission would face the option of changing its regulations (under outside pressure and scrutiny) or being subject to authorized trade retaliation by other

---

[10] *Regulation of International Accounting Rates*, CC Docket No. 90-337, FCC 96-459, (rel. December 3, 1996), Phase II, Fourth Report and Order, *recon. pending* [hereinafter "*Flexibility Order*"].

WTO Members. U.S. telecommunications companies would quite likely bear the brunt of any such retaliation.

If the *NPRM* were to survive a challenge before the WTO dispute resolution body, other countries would have a virtual license to promulgate regulations that might appear similar to the *NPRM* and be justified in terms of competitive safeguards, but could well be anticipated, at least in some countries, to be more restrictive than the *NPRM*. The U.S. ability to challenge such foreign regulations would, in that instance, be substantially reduced. U.S. telecommunications companies and service suppliers seeking to enter those markets might well face substantial barriers to entry disguised as competitive safeguards or protection of public interest and the United States would, through its defense of the *NPRM*, have undercut its own ability to combat such regulations.

Thus, as noted above, GTE urges the Commission to reexamine several of the proposals in the *NPRM* to ensure that they can be defended not only within the context of the GBT Agreement (and the dispute resolution procedures applicable thereunder), but in terms of effectively opening foreign markets. In several specific areas, GTE considers that less burdensome regulations would fully protect the competitiveness of the U.S. market and better advance the U.S. interest in opening foreign markets.

II. THE COMMISSION SHOULD RELY ON RIGOROUS U.S. ENFORCEMENT OF GBT COMMITMENTS THROUGH WTO PROCEDURES AND ENSURE THAT ITS RULES ARE CONSISTENT WITH THE GBT AGREEMENT.

While approving of the Commission's goal to thwart anticompetitive conduct in U.S. telecommunications markets, GTE suggests that the Commission focus more attention on opening foreign markets through enforcing the GBT commitments, particularly the Reference

Paper. In light of the market access, interconnection and enforcement provisions of the GBT agreement and the Reference Paper, some of the Commission's proposed rules for foreign participation in the U.S. international services market may be unnecessarily broad. They may also conflict with U.S. obligations under GATS.

Burdening international service providers with unnecessary or impermissible regulation could encourage a WTO challenge or the adoption of similar, and likely more restrictive, regulations upon U.S. entry to foreign markets. Either a WTO challenge or retaliatory regulation would ultimately harm, rather than encourage, competition.[11] GTE therefore urges the Commission to pursue the opening of foreign markets while ensuring that its own rules governing entry are compatible with U.S. obligations under GATS and no broader than necessary.

A. The Regulatory Reference Paper Prescribes Specific Undertakings By Member States To Ensure Market Access and Fair Competition.

The Reference Paper, adopted by 65 countries representing 93% of the world telecommunications market,[12] is specifically designed to ensure that telecommunications service providers from WTO member countries gain access to the markets of other WTO Members and benefit from fair and enforceable rules in those markets. Reference Paper signatories undertake to adhere to regulatory principles that are, in many respects, similar to the U.S. framework for domestic regulation established by the Telecommunications Act of 1996. The Reference Paper's

---

[11] A referral to the WTO's dispute settlement body would also represent some loss of U.S. control over its market entry process, a result that should be avoided.

[12] Eight of these countries have accepted many, but not all, of the principles in the Reference Paper.

principles should facilitate open foreign markets and, at the same time, vastly reduce, if not eliminate, the risk that foreign and foreign-affiliated providers can distort competition in the U.S. international services market.

First, the Reference Paper mandates nondiscriminatory and cost-oriented interconnection under transparent and reasonable terms. Major suppliers of telecommunications services must provide network interconnection in a timely fashion and of a quality equivalent to that used by the major supplier itself for like services.[13] Second, the Reference Paper binds signatories to maintain appropriate measures to stop current, and prevent future, anticompetitive practices, most notably cross-subsidization and the anticompetitive use of information. Finally, Reference Paper signatories must establish an independent and impartial regulatory body that is separate from, and not accountable to, any supplier of basic telecommunications services. Among other duties, the independent regulator is responsible for resolving interconnection disputes and overseeing licensing processes to ensure they are transparent and nondiscriminatory. The United States, as a party to the Reference Paper, will be able to enforce all of these rights and obligations in WTO enforcement procedures. U.S. companies entering foreign markets will have access to regulatory processes on the same terms as companies based in the foreign market.

Together, the GBT Agreement and the Reference Paper facilitate access to the key elements of end-to-end international services. Provision of these services requires access on reasonable terms to: (1) domestic and foreign local exchanges; (2) connection at both ends to reach the cable stations (or earth stations); and (3) submarine cable systems or satellite systems.

[13] Under the Reference Paper, "major suppliers" include those carriers that have control over "essential facilities" and are able to materially affect the price and supply of those facilities.

Competition will be adversely affected if reasonable access to any element is restricted. The GBT Agreement and Reference Paper represent binding commitments by the authorities that control some of these critical service elements to provide real access to markets that have, either formally or in practical effect, been closed to U.S. companies. These commitments should be welcomed, built upon and vigorously policed through the mechanisms available under the GATS.

In particular, the Commission should use the commitments in the Reference Paper as the point of departure for reducing the regulatory burden on those providing or seeking to provide international services to other WTO Members. The Commission should review several of the *NPRM*'s competitive safeguards and eliminate or substantially modify those that are redundant of protections offered by other countries' full implementation and enforcement of their Reference Paper obligations.

Unfortunately, while the *NPRM* recites the competition-enhancing elements of the Reference Paper,[14] the Commission does not take those elements into account in designing its competitive safeguards. Rather than build upon the Reference Paper as an enforceable treaty binding upon the foreign authorities on whom U.S. companies ultimately depend for effective market access, the *NPRM* severely discounts other countries' performance of their obligations. Although the *NPRM* articulates no circumstance in which a carrier from a WTO Member that fully complies with the Reference Paper could leverage its control over "bottleneck services or facilities on the route in question"[15] to distort competition in the U.S. market, the Commission

---

14 *NPRM* ¶ 24.

15 *Id.* ¶ 6.

has nevertheless reserved for itself authority to deny that carrier access to the U.S. market. If other national regulators denied U.S. companies access to their national markets based on the commercial or infrastructure characteristics of the U.S. market, without reference to the Commission and its regulations, both the U.S. company and the U.S. government would be justifiably incensed.

GTE suggests that the Commission articulate a policy of rigorous U.S. enforcement of WTO commitments, including the Reference Paper, and reexamine the *NPRM*'s proposed competitive safeguards with a view to whether they represent the least restrictive means available to protect the U.S. international services market from competitive harm. In light of the GBT Agreement and the Reference Paper, the Commission should be able to reduce regulation of entry for carriers from WTO countries and their affiliates. If the Commission determines that competitive safeguards are nonetheless necessary, GTE suggests that the Commission clearly articulate the basis for its decision, explaining why Reference Paper safeguards alone are inadequate.

B. The Commission Should Encourage Foreign Countries to Open Their Markets and Should Take Into Account Other Countries' GBT Commitments In Evaluating "Market Power."

The Commission should adopt rules that encourage the opening of foreign markets. Some of the rules proposed in the *NPRM*, however, are likely to have the opposite effect. The FCC's tentative decision to deny entry to or strictly regulate an applicant or its foreign affiliate deemed to pose a high risk to competition is not supported. The Commission has failed to articulate any instance in which an applicant from a GBT-compliant country cannot be prevented from harming the U.S. market by less burdensome means, especially post-entry conditions. The

NPRM's lack of clarity in this regard invites a WTO challenge that can only be harmful to broader U.S. interests.

Moreover, there are strong policy reasons not to deny entry to the U.S. market on the basis of foreign market power, which the *NPRM* defines as the "*ability* to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the route in question."[16] First, the *ability* to control bottleneck facilities is not necessarily an accurate indication of likely future anticompetitive *behavior*. Second, to the extent they are perceived as limiting access to the U.S. market, the proposed rules can be expected to elicit retaliatory regulations from other countries. The Commission should avoid implementing rules that harm U.S. interests abroad by duplicating regulatory safeguards contained within the Reference Paper. Instead, the U.S. should rigorously enforce the GBT Agreement and the Reference Paper through WTO dispute resolution procedures. The Commission should adopt rules that are fully consistent with U.S. commitments, easing any regulation that is unnecessary in light of the GBT Agreement and the Reference Paper.

At a minimum, the definition of "bottleneck facilities" should not include local exchange facilities for WTO Members in compliance with their obligations under the GBT Agreement and Reference Paper. Compliance with a GBT-consistent interconnection regime should eliminate the foreign carrier's ability to harm the U.S. market by minimizing any ability to restrict output. Consequently, foreign carriers from WTO Member countries that are in compliance with the GBT Agreement and the Reference Paper should not be deemed a "very high risk" to competition and should not be denied access to the United States on that basis.

---

[16] *Id.* (emphasis added).

The Commission's proposed rules may also be inconsistent with the GATS requirement that the United States, as a WTO Member, accord to services and service suppliers of all other WTO Members treatment consistent with the "Most Favored Nation" ("MFN") and "National Treatment" ("NT") obligations of the GATS. Pursuant to MFN, the United States must treat all other WTO Members and their carriers similarly. This obligation is "immediate[] and unconditional[]" upon the GBT's entry into force.[17] Under NT, the United States must provide companies from other WTO Members the same treatment it provides its own companies.[18]

Contrary to these principles, the Commission's proposed market power determination would require the Commission to base its decision about whether to permit foreign participation in the U.S. market on an examination of each foreign-affiliated applicant's home market. In other words, the proposed regulations would permit the Commission to regulate major telecommunications suppliers differently based on the characteristics of their home country markets. Moreover, foreign carriers not affiliated with a major supplier in the destination country on the particular route would not face this additional scrutiny, nor would purely domestic carriers. GTE urges the Commission to reexamine its approach to this issue and, if it insists on retaining the discretion to deny market access to applicants from or affiliated with WTO Members, to articulate clearly why its authority is consistent with U.S. obligations.

---

17 GATS, art. II. The GBT provides for derogation from MFN treatment, but the one MFN exception claimed by the United States is not relevant to this proceeding.

18 *Id.* art. XVII. In applying the NT provision, countries may make formal distinctions between domestic and foreign providers, but such differences may not substantially disadvantage foreign competitors.

C. In A GBT-Consistent Market, "Market Share" Is Not An Adequate Proxy For "Market Power."

GTE endorses the Commission's tentative conclusion that "market share" should not be considered when determining whether to impose non-dominant, dominant, or supplemental dominant regulation upon carriers from WTO Member countries.[19] Likewise, market share should not be considered when determining whether to grant or deny market access because market share cannot reliably predict the exercise of market power. The Commission should focus on demonstrated anticompetitive actions rather than the mere possession of market share.

Market share is not an accurate predictor of market power or likely future anticompetitive behavior. Competition in some markets or on some routes may result in certain carriers possessing commanding market share. Other markets may be too small to support "multiple" facilities-based competitors on international routes, even to the United States. In some markets, competitors will not want to challenge the market share of the incumbent operator, or will not immediately be able to challenge that market share for reasons unrelated to actions of the incumbent. In any event, the requirements for nondiscriminatory interconnection, adequate competitive safeguards and oversight by an independent regulator imposed upon WTO Member countries by the GBT Agreement and the Reference Paper will prevent carriers with market share from distorting competition in the U.S. market.

The Commission's rules should focus on detecting anticompetitive behavior within the U.S. market, preventing that behavior from continuing once detected, and alerting the Executive branch so that it can pursue the matter further, if necessary, through WTO dispute resolution

---

[19] *NPRM* ¶¶ 88-89.

procedures and the enforcement of U.S. antitrust laws. Denying market access based simply on market share could violate U.S. commitments under the GBT Agreement and the Reference Paper, undermine the GBT Agreement and the Reference Paper, and harm the efforts of U.S. entities to enter foreign markets. Consequently, GTE urges the Commission not to consider market share when determining whether to permit foreign participation in the U.S. telecommunications market.

D. Where A GBT Commitment Is Violated, The First Recourse Should Be To WTO Dispute Settlement Procedures Rather Than Unilateral Action.

The commitments imposed by the GBT Agreement and Reference Paper are fully binding and can be enforced through WTO dispute settlement. Consequently, GTE urges the Commission to recognize in its rules that, where a foreign country violates a GBT commitment, the U.S. first should take the trade dispute with the foreign country to the WTO.[20]

In its *NPRM*, the Commission recognizes that the remedies available to a successful plaintiff in a trade dispute before the WTO do not include specific performance.[21] GTE is concerned that denying market entry or imposing stricter regulation based upon the "ability to control bottleneck facilities" will be seen as an attempt to preempt the WTO dispute resolution process. The Commission's proposed rules could be interpreted as allowing the U.S. to deny other WTO Members the benefits of the GBT based on criteria not fully consistent with the GBT

---

[20] In addition to access to the WTO dispute resolution procedures, U.S. carriers will have access to foreign regulatory processes under the Reference Paper. Denial of such participation (or rendering it useless) should be viewed as an actionable violation of the Reference Paper.

[21] *NPRM* ¶ 23.

Agreement, Reference Paper or the GATS. As discussed earlier, the Commission's rules could be challenged before the WTO, or WTO Members might follow the U.S. lead by enacting their own "competitive safeguards" that would act as barriers to market entry. Consequently, GTE urges the Commission to approve all foreign or foreign-affiliated carriers for entry to the U.S. market under similar regulatory conditions.

III. THE COMMISSION'S USE OF "OTHER PUBLIC INTEREST FACTORS" TO DENY ENTRY TO THE U.S. MARKET MAY ULTIMATELY INURE TO THE DETRIMENT OF U.S. COMPANIES.

The *NPRM* reserves for the Commission the right to deny entry to the U.S. market for the provision of facilities-based, resold switched, and resold non-interconnected private line services based on "other public interest factors," such as national security, law enforcement, foreign policy and trade concerns.[22] Similarly, the Commission proposes to refuse foreign ownership of radio licenses in excess of twenty-five percent if such ownership would raise public interest concerns.[23] Cable landing licenses would also be subject to denial on the basis of compelling public interest concerns.[24]

GTE is concerned that the Commission's use of inadequately justified and possibly GATS-inconsistent public interest factors to deny foreign companies access to the U.S. market may result in retaliatory treatment of U.S. companies in foreign markets or a WTO challenge. Accordingly, GTE urges the Commission to evaluate the extent to which an adverse decision by

---

22 *Id.* ¶ 43.

23 *Id.* ¶ 74.

24 *Id.* ¶ 62.

the WTO or retaliatory treatment in foreign markets could harm U.S. companies' business opportunities abroad. GTE suggests that such harm to U.S. companies may exceed any benefit the U.S. telecommunications market would derive from restricting entry on the basis of vague public interest factors. As such, the Commission should refrain from using public interest factors to deny market access or, at the very least, articulate better its public interest concerns and why they are appropriate grounds to condition access to the U.S. market.

A. Although National Security And Law Enforcement Concerns May Be GATS-Consistent Grounds For Denial Of Entry To The U.S. Market, Additional Regulation In This Regard May Be Unnecessary.

GATS Article XIV *bis* permits WTO Members to deviate from GATS obligations to protect their "essential security interests" or to carry out their obligations under the United Nations Charter to maintain "international peace and security."[25] GATS article XIV allows WTO Members to adopt and enforce measures to maintain "public order," provided a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.[26]

Arguably, U.S. national security and law enforcement concerns would be permissible grounds for denying market access, if carefully structured to conform to these GATS exceptions. Even so, adoption of additional and, most likely, unnecessary regulation risks undermining global confidence in the GATS' ability to open foreign markets in a pro-competitive manner. Foreign countries could be relied upon to claim the same broad right to control market access in the name of these vague "public interest factors," thereby, imposing additional burdens on U.S.

---

[25] *See* GATS, art. XIV *bis* (b) and (c).

[26] *Id.* art. XIV(a) and n.5.

companies seeking to enter those markets. GTE, thus, suggests that the Commission avoid new regulation and rely on the existing GATS provisions in their present forms to address national security and law enforcement concerns.

B. Denial Of Entry To The U.S. Market Based On Foreign Policy Or Trade Concerns Is Fundamentally Inconsistent With GATS And Could Result In More Barriers To U.S. Companies' Opportunities Abroad.

The Commission's proposed denial of market entry to foreign and foreign-affiliated carriers on the basis of "foreign policy" and "trade concerns" is fundamentally inconsistent with GATS. There is no textual basis for these exceptions. The *NPRM* fails to link them to any provision of the GATS or the GBT Agreement and they are very likely to violate MFN or, more fundamentally, U.S. market access commitments. Moreover, unilateral assumption of authority to raise additional trade and foreign policy concerns could be seen as a method of bypassing existing trade agreements and would quite likely prompt other WTO Members to retaliate to the detriment of U.S. interests.

Specifically, denying market access on the basis of "foreign policy concerns" would essentially permit any WTO Member to invoke its sovereign interests as an excuse for denying free trade. While the Commission would probably not abuse discretionary authority to deny access to the U.S. market, other countries could use an identically-phrased policy as a pretext for imposing or maintaining barriers to their markets on a virtually ad hoc basis. Thus, GTE is concerned that the Commission's retention of overly broad power to deny market access could ultimately result in more barriers to U.S. companies' opportunities overseas. GTE suggests, therefore, that the Commission avoid claiming trade or foreign policy concerns as bases for denying market entry.

C. The Commission Has Not Fully Explained And Made Transparent Its Use of Public Interest Factors To Deny Market Entry.

Pursuant to GATS article III and the Reference Paper, the United States is under an obligation to provide transparent regulations regarding market entry. Specifically, the United States is required to publish and respond to inquiries for specific information on relevant measures affecting the application of GATS.[27] The Reference Paper further mandates that the U.S. make interconnection and licensing procedures fully transparent.[28] The Commission's vague and ambiguous statements regarding other public interest factors (especially "foreign policy" and "trade concerns" which have no link to the GATS) seem unlikely to provide enough information to international service providers and, therefore, appear to violate the transparency requirements of GATS and the Reference Paper.[29]

If the Commission persists in claiming authority to deny market access for "other public interest concerns" it should, at a minimum, draft its concerns in a clearer fashion and with a view to forestalling or surviving a WTO challenge. Providing such specificity may also substantially reduce the danger to U.S. companies if similar public interest restrictions are imposed by other WTO Members.

---

27 *Id.* arts. III(1) and (4).

28 Reference Paper ¶ 2.4 and 4.

29 GATS, art. III; Reference Paper ¶ 4.

IV. THE COMMISSION'S PROPOSALS FOR DEFINING AND REGULATING "NON-DOMINANT," "BASIC DOMINANT" AND "SUPPLEMENTAL DOMINANT" SUPPLIERS WILL DISPROPORTIONATELY AFFECT FOREIGN CARRIERS AND THEIR AFFILIATES.

GTE commends the Commission for concluding that it can scale back some of the current basic dominant carrier safeguards without compromising the Commission's ability to monitor and prevent anticompetitive conduct.[30] GTE is concerned, however, about the Commission's decision to impose dominant regulatory treatment on carriers from WTO member countries based on an undemonstrated capacity to harm competition in the U.S. international services market. While not a per se prohibition on entry, the proposed dominant regulatory treatment places appreciable competitive burdens on foreign-affiliated carriers.

GTE urges the Commission to adopt a presumption that dominant regulation is unnecessary for U.S. affiliates of carriers from WTO member countries. As noted above, the ability to control bottleneck facilities in a GBT-compliant foreign market does not translate into the type of market power that would allow a carrier to distort competition in the U.S. international services market. Moreover, discriminating against the U.S.-affiliate of a major supplier subject to a full array of GBT-based safeguards in its home market may violate U.S. MFN and NT commitments under GATS.

A. The Commission Should Avoid Subjecting Foreign-Affiliated Carriers To "Supplemental Dominant" Regulation Which May Violate U.S. NT and MFN Obligations.

GTE is concerned that the Commission's proposal "to impose supplemental carrier regulation on U.S. carriers whose foreign affiliates have market power in destination countries

---

30 *NPRM* ¶ 83.

and do not face facilities-based competition for international services in these destination countries"[31] may be inconsistent with U.S. NT obligations. The Commission's proposed Supplemental Dominant regulations would only apply to U.S. carriers affiliated with foreign carriers, not to purely domestic U.S. carriers.

While the NT provisions of the GATS permit some formal distinctions between foreign and domestic suppliers, those distinctions may not place foreign suppliers at a competitive disadvantage in the U.S. market. Several aspects of the Commission's proposed Supplemental Dominant regulations impose more than merely formal burdens on foreign-affiliated carriers. In particular, prohibiting carriers deemed Supplemental Dominant from entering into exclusive joint marketing arrangements with their affiliates in certain markets creates a substantive competitive disadvantage.[32] Requiring only Supplemental Dominant carriers to obtain prior approval before adding new circuits on a route imposes an appreciable competitive burden, slows a carrier's ability to respond to the marketplace and, ultimately, redounds to the disadvantage of U.S. consumers with respect to both price and service quality.

Similarly, the Commission's proposed Supplemental Dominant regulation may be inconsistent with U.S. MFN obligations. The Commission proposes to regulate foreign-affiliated

---

31 *Id.* ¶ 104.

32 Even the *NPRM* acknowledges that the proposed restriction on joint marketing "may unnecessarily limit potential U.S. consumer benefits." *NPRM* ¶ 105. The NT violation is illustrated by comparing the *NPRM*'s provisions on joint marketing with the Commission's treatment of U.S. local exchange carriers that control bottleneck facilities. Affiliates of these U.S.-local exchange carriers may offer international services as "non-dominant" carriers. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Market,* CC Docket Nos. 96-149 and 96-61, FCC 97-142, ¶¶ 135-142 (April 17, 1997) Second Report and Order [hereinafter "*LEC Regulatory Treatment Order*"].

entrants in the U.S. market differently based on characteristics of applicants' home markets. Unlike the NT obligation, where certain formal differences can be tolerated, the MFN obligation is "immediate and unconditional." It is quite likely that the proposed restrictions on joint marketing and adding circuits will violate MFN because they would have a substantive competitive impact on only certain U.S. affiliates of foreign carriers. Consequently, to avoid a WTO challenge, GTE urges the Commission not to impose any substantive supplemental regulation on U.S. affiliates of carriers from WTO member countries.

B. The Commission Should Not Subject U.S. Affiliates Of Foreign Carriers To Unnecessary Supplemental Dominant Regulation.

The Commission should not compel U.S. affiliates of carriers from WTO member countries to seek prior approval before adding circuits, as proposed in the *NPRM* under Supplemental Dominant regulation. Instead, the Commission should monitor carriers' behavior through reporting requirements. Quarterly reporting requirements should be sufficient to allow the Commission to detect anticompetitive practices. Requiring prior approval would simply invite competitors to protest the addition of such circuits, delaying approval and, hence, U.S. consumers' access to improved service.

Likewise, the Commission need not impose joint marketing restrictions to protect competition in the U.S. market. The *Flexibility Order* already ensures that carriers controlling 25% or more of the traffic on an international route do not enter into alternative settlement arrangements, which could include joint marketing agreements, that discriminate against competing carriers. The approach adopted in the *Flexibility Order* relates higher restrictions to actual control on a route rather than to the characteristics of a foreign market, and is more consistent with both U.S. goals and trade obligations than the criteria proposed in the *NPRM.*

In addition, the term "joint marketing" is not well defined. Thus, it will be difficult for service providers to understand what is prohibited and what is permitted. Such confusion will have an adverse impact on the market and likely will deny consumers the potential benefits of one-stop shopping, a concern expressed by the Commission.[33] Accordingly, GTE suggests that, absent evidence to the contrary, the *Flexibility Order* safeguard be utilized and any further restrictions be tailored to address specifically identified anticompetitive consequences.

The Commission has tentatively proposed "to prohibit a U.S. facilities-based private line carrier from originating or terminating U.S. switched traffic over its facilities-based private lines until all U.S. carriers' settlement rates for the country or location at the foreign end of the private line are within the benchmark settlement range to be established in the *Benchmarks* proceeding."[34] GTE is concerned that this prohibition would violate NT, because U.S. carriers with control over local "essential facilities" would not face the same restrictions.[35] As noted in its supplemental comments in the *Benchmarks* proceeding, GTE considers that the proposed prohibition is unnecessary and that the U.S. market can be adequately protected by reporting requirements sufficient to ensure that the Commission can detect, deter and remedy any one-way bypass that might actually occur over private lines.

---

33 *NPRM* ¶ 105.

34 *Id.* ¶ 121. *See International Settlement Rates*, IB Docket No. 96-261, FCC 96-484 (rel. Dec. 19, 1996) Notice of Proposed Rulemaking, [hereinafter "*Benchmarks*"].

35 GTE has already submitted comments on the *Benchmarks* proceeding, including supplemental comments on the specific prohibition of facilities-based private line carriers. GTE hereby reiterates and incorporates herein by reference its doubts about the GBT compatibility of numerous aspects of the *Benchmarks NPRM. See* Comments of GTE Services Corporation, *Benchmarks* (February 7, 1997).

V. GTE ENDORSES MEASURES TO REDUCE REGULATION AND TO ALLOW FLEXIBILITY TO ADDRESS THE COMPETITIVE MARKETPLACE

GTE believes it is appropriate to reduce regulation where possible (e.g. tariff notifications) and to allow as much flexibility as reasonable to carriers in conducting its business. GTE, therefore, supports the Commission's proposed adoption of a rebuttable presumption that carriers from WTO Member countries are permitted the flexibility to enter into alternative settlement arrangements.[36] The proposed expansion of this pro-competitive policy is desirable because it affords carriers the opportunity to compete more efficiently through innovative arrangements, but yet contains reasonable safeguards.

It is also important that carriers be allowed to configure their international networks in the most efficient manner so as to be able to be competitive. The ability to "hub" networks from the most efficient locations will be essential in designing international networks to deliver services at competitive prices. As such, there should be as few constraints on hubbing as possible. In that regard, it would seem appropriate for the Commission to revise Section 63.17 of its rules[37] to reflect WTO Member countries rather than the current description of equivalent countries.

VI. CONCLUSION

GTE enthusiastically supports the Commission's efforts to reduce the regulatory burden on participants in the international telecommunications market and to permit those markets to be driven, to the greatest possible extent, by competitive forces. The *NPRM* is a substantial step in

---

36 *NPRM* ¶ 150.

37 *See* 47 CFR 63.17(b) (dealing with "switched hubbing" to equivalent countries).